

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-5027

In The
United States Court of Appeals

For the Second Circuit

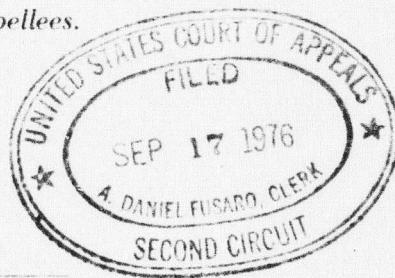
In the Matter of
CHILI HEIGHTS ASSOCIATES,
Debtor.
CENTRAL TRUST COMPANY ROCHESTER N.Y.,
Appellant.
vs.

JEROME C. ROSENTHAL, LEONARD MORRIS,
ELIZABETH BAUER, JOSEPH FAZIO, LEONARD
ZACCAGLINO, and FRANK RIZZO,

Appellees.

ON APPEAL FROM THE DECISION
AND ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BK-75-4635



BRIEF OF APPELLANT

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STATEMENT OF ISSUES

1. Whether the entry of judgments by Central Trust Company Rochester N.Y. against

Jerome C. Rosenthal Joseph Fazio

Leonard Morris Leonard Zaccaglino

Elizabeth Bauer Frank Rizzo

in the New York State Supreme Court on May 13, 1976 violated any order of the United States District Court for the Western District of New York?

2. Whether the United State District Court for the Western District of New York had jurisdiction to stay actions commenced by Central Trust Company Rochester N.Y. against

Jerome C. Rosenthal Joseph Fazio

Leonard Morris Leonard Zaccaglino

Elizabeth Bauer Frank Rizzo

in the New York State Supreme Court and/or stay the entry of judgments therein?

PRELIMINARY STATEMENT
AND STATEMENT OF THE CASE

Appellant Central Trust Company Rochester N.Y., herein referred to as "Central", seeks to reverse an Order and Decision dated July 21, 1976 (A86-90)¹ issued by the Honorable Harold P. Burke, United States District Court Judge, Western District of New York.

On December 31, 1976, Chili Heights Associates, a New York partnership, filed a petition (A9) for a real property arrangement under Chapter XII of the Bankruptcy Act, 11 U.S.C. §801 et. seq.

Central did not loan any funds to Chili Heights Associates, however, it did loan approximately \$100,000 on a demand note basis to six individuals, none of whom has filed for relief under the Bankruptcy Act. Actions to enforce payment of the demand notes were commenced in the New York Supreme Court in the months of December 1975 and January 1976.

On February 5, 1976, the U.S. District Court for the Western District of New York entered a temporary stay (A-13) enjoining the continuation of any suits against Jerome C. Rosenthal, Leonard Zaccaglino, Leonard Morris,

1. All references are to pages of the Appendix submitted with this Brief.

Elizabeth Bauer, Joseph Fazio and Frank Rizzo, herein referred to as the "Individuals." This temporary stay was issued in connection with an Appeal by the Individuals of Bankruptcy Judge Hayes January 29, 1976 Order (A11-12) which modified his Order of January 5, 1976 (A10).

On March 1, 1976, the U.S. District Court for the Western District of New York modified its February 5, 1976 Order (A13) by issuing an Order to Show Cause (A14-15) which permitted Central to proceed with its New York State lawsuits against the Individuals pending the determination of its Application (A14-37) for relief from the February 5, 1976 temporary stay (A13).

Thereafter, the U.S. District Court for the Western District of New York issued a series of Orders, the effect of which was to release Central from the provisions of the Court's February 5, 1976 Order (A13). As a result, on May 13, 1976, Central entered judgments in the New York State Supreme Court against the Individuals on the demand notes (A20-35).

On May 26, 1976, U.S. District Court for the Western District of New York issued an Order to Show Cause (A44-46) why the judgments entered by Central against the Individuals should not be vacated. On July 21, 1976, the District Court issued an Order (A86-90) vacating Central's judgments, along with a decision stating that Central's

judgments had been entered in contravention of the District Court's stay Orders.

This appeal is taken from the Order of July 21, 1976 (A86-90).

The execution of this Order being appealed has been stayed pending appeal by an Order of the U.S. District Court, Western District of New York, dated September 14, 1976.

FACTS

In the months of December 1975 and January 1976, Central commenced sixteen actions in the New York State Supreme Court, against the following persons:

Leonard Zaccaglino

Elizabeth Bauer

Frank Rizzo

Leonard Morris

Joseph Fazio

Jerome C. Rosenthal

These actions were based on demand notes (A20-35) executed by the various Individuals in their individual capacity.

On December 31, 1975, Chili Heights Associates, a partnership filed a petition (A9) in the United States District Court for the Western District of New York seeking relief pursuant to the Chapter XII of the Bankruptcy Act. 11 U.S.C. §801, et. seq. The petition was on behalf of the partnership only, and not on behalf of any of the individual partners. The Individuals hereinbefore named were members of the partnership. The filing of the Chapter XII petition had no effect on Central's

sixteen New York State Court actions, since none of the individuals had sought relief under the Bankruptcy Act.

On January 5, 1976, Bankruptcy Judge Hayes issued an Order (A-10) staying suits against Chili Heights Associates, its nominee corporation Chili Heights Apartments, Inc. and any suits involving guarantees of the partnership's indebtedness by the individual partners. Central's State Court actions were unaffected by this Order, since its suits were based on individual demand notes (A20-35) and not on guaranteed indebtedness.

On January 29, 1976, Bankruptcy Judge Hayes issued an Order (All-12) modifying his January 5, 1976 Order (A10) so that suits only against the debtor Chili Heights Associates were stayed. Again, Central remained unaffected, and its New York State Court suits proceeded through the pleading stage.

Bankruptcy Judge Hayes January 29, 1976 Order (All-12) was appealed by the individual partners to the U.S. District Court for the Western District of New York. On February 5, 1976, that Court issued a temporary stay pending appeal (A13) which reinstated the January 5, 1976 Order (A10) of Bankruptcy Judge Hayes and further ordered:

...that all persons by and they hereby are stayed and enjoined from commencing or continuing any suit against JEROME C. ROSENTHAL, ESQ., LEONARD MORRIS, ESQ., ELIZABETH BAUER, JOSEPH FAZIO, LEONARD ZACCAGLINO, FRANK RIZZO, until the aforesaid appeal is determined. (A13)

By its terms the District Court's February 5, 1976 temporary stay (A13) was to be in effect only until the District Court determined the appeal of Bankruptcy Judge Hayes January 29, 1976 Order (A11-12). When the District Court's temporary stay pending appeal issued (A13), Central suspended action on the State Court proceedings and sought relief from the temporary stay Order (A13) on the ground that the District Court had no jurisdiction to stay Central's State Court suits against the Individuals. On March 1, 1976, the District Court granted Central partial relief from the temporary stay (A13) by granting it permission to (A14-15) to proceed with its actions in the New York State Supreme Court, with the condition that no judgments could be entered in the New York State Court actions until the District Court determined the issue raised by Central's application (A14-37) for relief from the temporary stay pending appeal (A13).

On March 18, 1976, the New York State Supreme Court granted Central summary judgment in its actions on the sixteen promissory notes (A20-35) executed by the Individuals. These Orders granting summary judgment determined the final liability of the Individuals on these notes, the time to appeal the Orders granting summary judgment having expired. New York CPLR 5513 (a). Central in compliance with the District Court's March 1, 1976 Order (A14-15) did not enter the judgments.

On April 26, 1976, the District Court issued an Order (A38-40) determining the individual partners' appeal of Bankruptcy Judge Hayes' January 29, 1976 Order (A11-12). The decision vacated the January 29, 1976 Order of Bankruptcy Judge Hayes (A11-12) which stayed suits only against Chili Heights Associates and reinstated the January 5, 1976 Order (A10) which stayed suits against the debtor, its nominee corporation and suits based upon guarantees of the partnership indebtedness. The April 26, 1976 Order and Decision (A38-40) also vacated the temporary stay of the District Court dated February 5, 1976, (A13) which by its terms, was effective only until the appeal was determined.

On May 10, 1976, the District Court issued its Order and Decision (A41-43) on Central's March 1, 1976 Application (A14-37). The Court referred to its April 26, 1976 (A38-40) decision wherein it reinstated Bankruptcy Judge Hayes January 5, 1976 Order (A10) and then vacated and nullified the final paragraph of its March 1, 1976 Order to Show Cause (A14-15) which allowed Central to proceed with its actions in New York State Court actions against the individuals, except that no judgments could be entered until Central's March 1, 1976 application (A14-37) was determined.

The effect of all the Orders and Stays on May 10, 1976 were as follows:

1. All suits against Chili Heights Associates, its nominee corporation and suits based upon guarantees of the indebtedness of Chili Heights Associates were stayed by the District Court's reinstatement of Bankruptcy Judge Hayes January 5, 1976 Order; (A10)
2. The District Court's February 5, 1976 temporary stay (A13) against suits against Jerome C. Rosenthal, Leonard Morris, Elizabeth Bauer, Joseph Fazio, Leonard Zaccaglino, and Frank Rizzo was by its own terms vacated upon the District Court's April 26, 1976 decision; (A38-40)
3. The paragraph of the March 1, 1976 Order to Show Cause (A14-15) allowing Central to proceed in New York Supreme Court but not enter any judgments was vacated and nullified by the District Court's May 10, 1976 decision (A41-43).

Since the New York State Supreme Court actions were not based upon guarantees of partnership indebtedness, and since May 10, 1976 decision (A41-43) vacated the prohibition against entry of judgments in State Court against the Individuals, Central entered judgments based upon the New York State Supreme Court Orders granting summary judgment.

The Individuals thereafter applied to the District Court to have the New York State Court judgments vacated. Such relief was granted by the District Court on July 21, 1976 (A86-90). A notice of appeal to the United States Court of Appeals for the Second Circuit from that Order was filed by Central.

ARGUMENT

POINT I

CENTRAL'S ENTRY OF JUDGMENTS AGAINST THE INDIVIDUALS ON MAY 13, 1976 WAS NOT PROHIBITED BY ANY ORDER OF THE UNITED STATES DISTRICT COURT OR BANKRUPTCY COURT.

Whether Central violated an Order of any Court in entering sixteen (16) judgments against the Individuals involves a factual determination. Central believes that no such violation occurred and that a factual determination in its favor can be made by reviewing the Statement of Facts.

The judgments in the New York State actions were entered on May 13, 1976. The District Court ordered those judgments vacated on July 21, 1976 (A86-90), when it found Central violated that Court's May 10, 1976 Order (A41-43). It is respectfully submitted that such finding is in error. Simply stated these are the pertinent Orders:

On March 1, 1976 the District Court authorized Central to continue its sixteen (16) lawsuits against the Individuals so long as it did not enter judgments (A14-15).

On May 10, 1976 the District Court vacated the aforesaid March 1, 1976 Order (A41-43).

As of May 13, 1976, the only stay order in

effect by any Court was Bankruptcy Judge Hayes' January 5, 1976 Order (A10), which stayed suits against Chili Heights Associates (the debtor), its nominee corporation, and suits against the Individuals based on a guaranty or the partnership indebtedness. Since Central's actions were based on personal demand notes (A20-35) made and delivered by the Individuals, they did not fall within the confines of the January 5, 1976 Order (A10) and Central was free to enter its judgments.

Based on the foregoing, Central clearly did not violate any Order of any Court in connection with the entry of Judgments and the Order vacating the Judgments (A86-90) should be reversed.

POINT II

THE DISTRICT COURT IN A CHAPTER
XII PROCEEDING LACKS JURISDICTION
TO STAY SUITS AGAINST PERSONS WHO
HAVE NOT FILED FOR RELIEF UNDER
THE BANKRUPTCY ACT

Bankruptcy Act §411, 11 U.S.C. §811 sets forth
the jurisdiction of the Bankruptcy Court in a
Chapter XII proceeding:

Where not inconsistent with the
provisions of this chapter, the
court in which the petition is
filed shall, for the purposes of
this chapter, have exclusive
jurisdiction of the debtor and
his property, wherever located.
(Emphasis Added.)

It is clear that a "debtor" within the
meaning of Bankruptcy Act §411, 11 U.S.C. §811,
is one who files a petition under Chapter XII:

For the purposes of this chapter...
(6) "debtor" shall mean a person,...
who files a petition under this
chapter. Bankruptcy Act §406(6),
11 U.S.C. §806.

Furthermore, the U. S. District Courts have
no greater jurisdiction in a Chapter XII proceeding
than the Bankruptcy Court, that is, jurisdiction
over the debtor and his property:

Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.
Bankruptcy Act §416, 11 U.S.C. §816.

None of the Individual partners of Chili Heights Associates filed for relief under the Bankruptcy Act. The sole entity in Chapter XII is a partnership, which is a separate and distinct entity from the Individuals, and fully authorized to file a petition under Chapter XII.

A petition may be filed by one or more or all of the general partners in the separate behalf of a partnership or jointly in behalf of a partnership and of the general partner or partners filing the same...
Bankruptcy Act §5(b), 11 U.S.C. §23, made applicable to Chapter XII proceedings by Bankruptcy Act §402, 11 U.S.C. §802.

Since none of the Individuals filed a petition under Chapter XII along with the debtor Chili Heights Associates, none of the Individuals is a "debtor" within the meaning of Bankruptcy Act §406(6), 11 U.S.C. §811. This being the case, neither the Bankruptcy Court nor the U.S. District Court has

jurisdiction over the individuals and their individual property, so as to have the power to stay suits against them.

Second Circuit case law provides further authority for the above stated contention.

In the case of In re Stanndco Developers, Inc., 534 F. 2d 1050 (2nd Cir. 1976), this Court held that a reorganization court could enjoin continuation of state court proceedings only if property of the "Debtor" would be affected thereby. While Stanndco was a proceeding under Chapter X of the Bankruptcy Act, 11 U.S.C. §501 et. seq., its holding is equally applicable to a Chapter XII proceeding such as this, since the jurisdiction of the Chapter X court is identical to that of the Chapter XII court, that is "...exclusive jurisdiction of the debtor and its (his) property, wherever located." Bankruptcy Act, §111, 11 U.S.C. §511; Bankruptcy Act §411, 11 U.S.C. §811.

In Stanndco, the Court stated that:

The district court in reorganization proceedings has no jurisdiction under the Act to restrain state court proceedings seeking to enforce liens on property not belonging to the debtor. In re Patten Paper

Co., 86 F. 2d 761, 765 (7th Cir. 1936); 6 Collier on Bankruptcy §3.32 at p. 657 (14th ed., 1972). Suits against persons concerning property which is not that of the debtor do not interfere with the reorganization of the debtor's estate and therefore are not enjoinable by the bankruptcy court. In re Muntz T.V., Inc. 229 F. 2d 314 (7th Cir. 1956) at 316-317. "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." Callaway v. Benton, 336 U.S. 132, 142, 69 S. Ct. 435, 441, 93 L. Ed. 553, 561 (1949). at 1053.

It is essential to note that in Stanndco, a state court judgment against the surety on the undertaking given to discharge the mechanics' lien could have an effect on the debtor's property, since the debtor had fully indemnified the surety, against loss on the undertaking by having deposited a letter of credit. Despite this, the Court permitted the mechanics' lienor to proceed with its state court action, since it held the District Court lacked jurisdiction to stay the suit.

In this case, Central's state court actions were based upon notes executed by the Individuals

(A20-35) in their individual capacity, and as such, do not involve "...the debtor and his property..." within the meaning of Bankruptcy Act §411, 11 U.S.C. §811. Moreover, enforcement of any judgments against the Individuals would be only against their individual property, not against any property of Chili Heights Associates, the entity in the Chapter XII proceeding. Thus, even more clearly than in Stanndco, the District Court lacked jurisdiction to stay state court suits against the Individuals.

Therefore, it is respectfully submitted that the District Court in this case lacks jurisdiction to stay proceedings, or the entry of judgments against the Individuals.

CONCLUSION

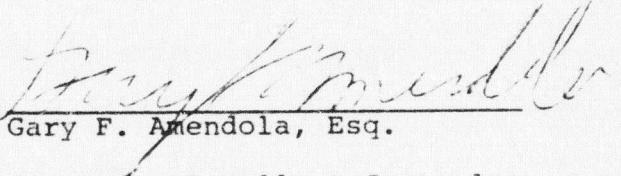
It is respectfully submitted that for the reasons set forth above, the July 21, 1976 Order (A86-90) of the United States District Court for the Western District of New York which vacated sixteen judgments entered by Central against the Individuals on May 13, 1976 in New York State Supreme Court, Monroe County, must be reversed.

DATED: September 15, 1976

Respectfully Submitted,

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Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

September 16, 1976

The Daily Record

Re: CHILI HEIGHTS ASSOCIATES, CENTRAL TRUST CO V ROSENTHAL ETAL

State of New York)
County of Monroe) ss.
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

WOODS, OVIATT, GILMAN, STURMAN AND CLARKE (Gary F. Amendola, Esq.)

Attorney(s) for

Appellant

On September 16, 1976

(s)he personally served three (3) copies of the printed Record Brief Appendix of the above entitled case addressed to:

MORTON BORNSTEIN, ESQ.
2912 Delaware Avenue
Kenmore, NY 14217

By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

By hand delivery

Sworn to before me this 16th day of September 1976

Lester A. Fanning
Notary Public
Commissioner of Deeds

LESTER A. FANNING

Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commission Expires March 30, 1978